Supreme Court, U. S.
FILED
MAY 24 1979
MICHAEL RODAK, JR., CLERK

No. 78-1685

In the Supreme Court of the United States

OCTOBER TERM, 1978

CBS INC., PETITIONER

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The order of the court of appeals (Pet. App. 7a) is not reported. The opinion of the district court (Pet. App. 41a-81a) is reported at 449 F. Supp. 1127.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1978. A petition for rehearing was denied on February 5, 1979 (Pet. App. 8a). The petition for a writ of certiorari was filed on May 7, 1979 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in declining to issue mandamus, at the behest of one not a party to the case, to vacate a consent judgment entered by the district court.

STATEMENT

On December 10, 1974, the United States filed a complaint charging that the National Broadcasting Company, Inc. ("NBC") had combined with its affiliated stations to use its control over access to network air time to restrain and monopolize prime time television entertainment programming exhibited on that network, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2 (Pet. App. 9a-19a). Identical complaints were filed simultaneously against the other two commercial television networks. *United States* v. *CBS Inc.*, No. 74-3599-RJK (C.D. Cal.); *United States* v. *American Broadcasting Cos.*, No. 74-3600-RJK (C.D. Cal.).[1]

On November 17, 1976, the United States and NBC filed a proposed final judgment. In essence, it enjoins NBC from obtaining any interest in television entertainment programming produced by others, except for the right to network exhibition (Pet. App. 23a), and

[1]Similar complaints had been filed against the three networks in April 1972. They were dismissed without prejudice in November 1974. *United States* v. *National Broadcasting Co.*, 65 F.R.D. 415 (C.D. Cal. 1974), appeal dismissed for want of jurisdiction, 421 U.S. 940 (1975). The networks alleged that the suits had been instituted for impermissible purposes. Although the government denied these allegations, the court, after the government was unable to comply with certain discovery demands, determined that dismissal without prejudice and filing new complaints during a new administration would be the most expeditious means of dispelling the allegations.

limits for ten years the amount of programming NBC may produce for use on its network (Pet. App. 24a-25a).[2] Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h), the proposed judgment, a competitive impact statement, written comments by interested members of the public, and responses by the United States were appropriately filed and published. 42 Fed. Reg. 24996-25312 (1977). Petitioner filed lengthy comments criticizing the decree. Both the government and the district court considered these comments. *Id.* at 25170-25253, 25254-25266; Pet. App. 63a-67a, 82a-121a.

In response to the various comments, the United States and NBC filed a stipulation on May 12, 1977, amending the proposed judgment.[3] The stipulation also preserved litigating rights on subject matter not treated in the proposed judgment. 42 Fed. Reg. 24997 (1977).

On April 20, 1977, before the United States had filed the amended proposed final judgment or its responses to public comment, petitioner moved to intervene in the government's action against NBC. The district court denied the motion. Petitioner has appealed from this decision, and the case is under

[2]It does not limit the amount of programming NBC may produce for sale to other networks. (NBC has been a negligible factor in program production.)

[3]One significant change was the deletion of a pay cable exclusivity section, which was opposed by pay cable and other interests. Although the United States intended that section to operate as a limit on the exclusivity terms that NBC could obtain, many of those who commented felt that it would put the government's imprimatur on activity considered abusive. The comments convinced the government that the section would not provide desirable relief, and the section was deleted. 42 Fed. Reg. 25112-25114 (1977).

submission. *United States* v. *National Broadcasting Co.*, No. 77-3381 (9th Cir. argued Apr. 3, 1979).

On November 7, 1977, after its motion to intervene had been denied, petitioner moved for an evidentiary hearing on the proposed consent judgment (Pet. 8). The district court, relying on the voluminous record of comments and oral argument, entered the proposed judgment on November 23, 1977, without an evidentiary hearing (Pet. App. 37a). It filed an opinion regarding the consent judgment on January 26, 1978 (Pet. App. 41a-81a).

After the entry of judgment, but before the district court filed its opinion, petitioner sought a writ of mandamus to require that the consent judgment be vacated. The court of appeals denied the petition without opinion (Pet. App. 7a).

ARGUMENT

There is no reason for this Court to review the denial of mandamus in this case. The denial is justified by a single, compelling reason: petitioner is not a party to this case, and nonparties cannot seek appellate review by mandamus or otherwise. See *Ex parte Leaf Tobacco Board of Trade*, 222 U.S. 578 (1911). The appropriate procedure to obtain review in cases such as this is to intervene in the district court and then to appeal, as of right, from the entry of final judgment. Petitioner sought to intervene, and its motion to do so was denied. That denial is the subject of a pending appeal. If the court of appeals holds that petitioner should have been allowed to intervene, then petitioner will be entitled to appeal from the entry of the consent decree. And if the court of appeals holds that the denial of intervention was proper, then there is no reason why petitioner should be allowed to proceed by

mandamus in what amounts to an attempt to avoid the consequences of the denial of intervention.

At all events, even if a nonparty sometimes may seek mandamus,[4] a court of appeals has ample discretion to decline to issue that writ. See, *e.g.*, *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655 (1978); *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976). Because petitioner can obtain any relief to which it is entitled if it succeeds on its challenge to the denial of intervention, there was no reason for the court of appeals to resort to an extraordinary writ.

Finally, petitioner's arguments on the merits do not establish that the district court so grossly abused its discretion that the court of appeals was *required* to resort to an extraordinary remedy. The district court gave all persons a chance to present their views on the merits of the decree; petitioner did so at length. The district court was well within its discretion not to hold an evidentiary hearing; no statute requires one. The court carefully considered the merits of the proposed decree and found that, although it displeased some persons by not going far enough and others by going too far, it was designed to address the competitive disadvantage caused by NBC's "enormous market power" (Pet. App. 80a). Petitioner's complaint (Pet. 13-16) that the consent judgment is contrary to the public interest because it will diminish potential competition

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[4]Petitioner's reliance on two cases that allowed nonparties to seek mandamus (Pet. 24) is unwarranted. Those cases involved orders directed to the press and involving the rights of the press. The fact that members of the press were addressees of the orders supplied the right to seek appellate relief. Petitioner, however, is not the addressee of any order entered in this case. Nothing affects petitioner's rights.

in program supply amounts to a request that the case proceed to a trial on the merits, the very thing a consent judgment is designed to avoid. The particular provision to which petitioner objects will not take effect until similar relief is obtained in suits against CBS and ABC (Pet. App. 33a, para. VII). It thus causes no immediate harm to petitioner; if CBS prevails in its suit, the provision will never become effective. It is, moreover, similar both in effect and in duration to the relief approved by this Court in *Ford Motor Co.* v. *United States*, 405 U.S. 562, 575 n.10 (1972).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1979

DOJ-1979-05